

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -
UNITED STATES OF AMERICA : CRIMINAL ACTION
: 16-mj-960/16-mj-1061
:
v. : Philadelphia, Pennsylvania
: April 18, 2017
IN RE: :
:
SEARCH WARRANT :
WITH GOOGLE ACCOUNTS :
: ORAL ARGUMENTS HEARING
- - - - -

BEFORE THE HONORABLE JUAN R. SANCHEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (At 10:02 a.m. in Courtroom 11A.)

2 DEPUTY CLERK: All rise.

3 THE COURT: You may be seated. Good morning,
4 everyone.

5 This is the matter of Google versus the United States.

6 The Court recognizes Attorney Todd Hinnen.

7 MR. HINNEN: Yes, your Honor.

8 THE COURT: And the Court also recognizes Attorney
9 William DeStefano.

10 MR. DeSTEFANO: Good morning, your Honor.

11 THE COURT: Good morning.

12 The Court also recognizes counsel for the Government,
13 Attorney Pak.

14 MR. PAK: Good morning, your Honor, thank you.

15 THE COURT: Good morning.

16 Attorney Levy.

17 MR. LEVY: Good morning, your Honor.

18 THE COURT: And Attorney Pekun.

19 MR. PEKUN: Good morning, your Honor.

20 THE COURT: All right, good morning, everyone.

21 I gather that you are ready to start the arguments?

22 MR. HINNEN: Yes --

23 DeSTEFANO: We are, your Honor.

24 MR. HINNEN: -- we are, your Honor.

25 THE COURT: Okay. Very well.

1 So, this will be -- is the plaintiff ready?

2 MR. PAK: Yes, your Honor.

3 THE COURT: Okay.

4 MR. HINNEN: May I speak from the podium, your Honor?

5 THE COURT: You may. Why don't you just come a little
6 closer.

7 MR. HINNEN: Thank you.

8 THE COURT: And it might be helpful for you to answer
9 a couple of factual questions for me, so that I could understand
10 the context -- a little bit -- of the argument, based on the
11 stipulations or the one stipulation that both you and the
12 Government presented to the Court and it was filed of record on
13 January 12th, 2017.

14 And that is that the stipulation says, basically, that
15 users' files may be broken down into component parts with
16 different parts of a single file stored in different locations
17 at different countries at the same time?

18 MR. HINNEN: That's correct, your Honor.

19 THE COURT: My question is, does that mean that a
20 single e-mail may be broken down in to pieces that are stored in
21 different locations at the same time?

22 MR. HINNEN: So, it's difficult to answer any general
23 question with respect to Google Services, because it has a
24 diversity of different services.

25 And with respect to the bodies of e-mails, I believe,

1 those are stored as a -- as a single hold, but your Honor's
2 point does apply to attachments to e-mails.

3 So, if I were to attach a Word document to an e-mail
4 to your Honor, it's possible that the network would break that
5 single Word document up in to multiple different component parts
6 which Google refers to as shards and store those parts at
7 different places on its network.

8 And the document would only be a comprehensible hold
9 when all of those different shards were reassembled to form the
10 whole document.

11 THE COURT: So -- so, what I was trying to get at is,
12 as to whether if you were to copy the data for a particular
13 customer from a particular location at a given point in time,
14 would you be able to get a complete e-mail or would you just get
15 fragmental parts that are meaningless, unless you put the -- the
16 pieces together that are located or spread around in different
17 countries at different points of time?

18 MR. HINNEN: And with respect to some of Googles's
19 services, your Honor, the latter is true. You would only be
20 able to produce the document, if you pulled each part from each
21 different data center wherever in the world it happened to be
22 located.

23 THE COURT: All right.

24 So, it only makes sense when all of the pieces are
25 kind of reassembled --

1 MR. HINNEN: That's correct.

2 THE COURT: -- and you are able to get them in a -- in
3 a readable format --

4 MR. HINNEN: That's correct, your Honor.

5 THE COURT: -- that's when it has meaning?

6 MR. HINNEN: That's correct, that's exactly right.

7 THE COURT: So, if you were to get these pieces from
8 overseas and look at them, they would be meaningless?

9 MR. HINNEN: That's exactly right, your Honor.

10 And they're not like pieces of a puzzle, where if you
11 got six of the seven pieces, you could make out six-sevenths of
12 the document. You can't make out anything comprehensible unless
13 you have all seven.

14 I -- I should hasten to add, though, that that does
15 only apply to some of Google services and the majority of the
16 services at issue in this case, sharding was not applied and the
17 documents were stored in the United States.

18 So, Google has been able to produce a significant
19 volume of documents in this case, both as a -- sort of general
20 matter -- and relevant to the -- to the whole corpus of
21 documents that would be encompassed by the warrants, if they
22 were to apply overseas as well as in the United States.

23 THE COURT: All right.

24 (Whispering held off the record at 10:06 a.m.)

25 THE COURT: The other factual question I have

1 regarding the stipulation is that, according to the stipulation,
2 only people in Google's legal investigation support team have
3 authorized access to access the contents of the communication in
4 order to respond to subpoenas, to court orders or to properly-
5 issued warrants.

6 My question is, how do these personnel -- people --
7 from the Legal Department assemble the data -- how do they go
8 about assembling this data? What is it that they exactly do in
9 copying or producing or retrieving the data?

10 MR. HINNEN: That's a -- a great question, your Honor
11 and I'll address it, briefly, in -- in the course of my
12 argument.

13 In order to query the network to ask the network
14 questions about where documents are, to isolate the responsive
15 documents and to retrieve the documents, so that they can be
16 produced, Google would have to write a query or a -- or a small
17 computer program for each of its services in order to go out,
18 search its network, determine where the documents are located,
19 gather only those documents that are responsive, nominally, to
20 the scope of the search warrant and retrieve those documents to
21 the United States, so they could be produced.

22 So, the process involves a series of queries from
23 Google's headquarters in California to wherever the documents
24 are located and responses from the data centers in those
25 locations to the United States, including ultimately sending the

1 documents that are responsive, so that they can be produced.

2 THE COURT: So, one question I have is, do the people
3 who retrieve the data in response to the warrant, do they know
4 -- at the point in time that they write the query or the program
5 -- do they know where the data is coming from?

6 MR. HINNEN: They didn't, your Honor, when the Second
7 Circuit handed down its decision last July.

8 And in order to be able to comply with the Second
9 Circuit's decision in the Microsoft case, Google has had to
10 rewrite those programs, so that they would tell the individual
11 who is responsible for producing the documents, at least,
12 whether the documents are inside or outside the United States.

13 So, at this point, when the query is run, the query
14 is, actually, limited to data centers within the United States.

15 THE COURT: Okay.

16 But so, they limit it, they don't -- they cannot tell
17 -- they -- by writing the program in such a way, they impose a
18 limitation as to what they believe is responsive to the
19 Government wants, excluding --

20 MR. HINNEN: They do, they --

21 THE COURT: -- excluding overseas data?

22 MR. HINNEN: That's correct, your Honor.

23 They ask questions of and receive answers from only
24 data centers located in the United States.

25 THE COURT: But obviously, you would have the same

1 ability to write a query or a program as you -- as you say --
2 that will be able to identify not only what is data that is --
3 is within the territory of the United States but also
4 overseas --

5 MR. HINNEN: Yes, your Honor, that -- that would --

6 THE COURT: -- that's not a problem, right?

7 MR. HINNEN: -- would be possible as a matter of
8 computer programming.

9 THE COURT: Right.

10 MR. HINNEN: Correct.

11 THE COURT: As a matter of computer programming, those
12 people that are writing the program and -- and retrieving or
13 reassembling -- for lack of a better word -- the data, that is
14 either coming from the United States or coming from abroad, how
15 long is that process?

16 MR. HINNEN: It's relatively involved, your Honor,
17 because Google offers so many different services and its network
18 is so complex. The process of -- of rewriting the set of
19 queries necessary to produce Govern -- information to the
20 Government -- took from when Google initiated it shortly after
21 the decision was handed down last July and it's still not
22 complete with respect to all services.

23 So, it's a very significant computer programming or
24 engineering exercise to write a query that reliably, identifies
25 the location of the data, limits itself to data in the United

1 States, isolates data responsive to the warrant and returns it
2 to the individual.

3 THE COURT: But that is because you had to write it
4 for the first time --

5 MR. HINNEN: That's correct, your Honor.

6 THE COURT: -- once you'd write it once, it's easy to
7 repeat?

8 MR. HINNEN: That's correct, your Honor.

9 THE COURT: Once you have it in your hands, how
10 quickly is it to identify the data that is responsive to the
11 warrant?

12 MR. HINNEN: It depends a little bit on how many
13 services the warrant relates to and that kind of thing, because
14 these processes do have to be run separately for separate
15 services. But I would say, the average compliance time is -- is
16 a couple of weeks to a month.

17 THE COURT: Okay, okay. Fair enough.

18 Let me move on to, probably, one of the -- to get the
19 argument started and focus a little bit.

20 You argue that for purposes of the second step of the
21 analysis under Morrison or under the Supreme Court case law, the
22 focus of the Stored Communication Act is the protection of the
23 privacy of the electronic communications.

24 And so, my question is, is it the focus of the Stored
25 Communications Act as a whole, that is relevant or the focus of

1 the -- that particular section, which talks about disclosure,
2 2703?

3 MR. HINNEN: Sure. That's a great question, your
4 Honor.

5 Ultimately, I -- I don't think it matters. I think
6 there has been some confusion introduced through the briefing
7 between determining whether a provision applies
8 extraterritorially and determining what the focus of the statute
9 is.

10 The determination of whether a provision applies
11 extraterritorially takes place on a section-by-section basis as
12 Morrison made clear with respect to the Securities and Exchange
13 Act in Morrison.

14 But that doesn't constrain a court in interpreting and
15 understanding the statute from looking at the totality of the
16 statute as common and well-established canons of statutory
17 interpretation would require it to do. Morrison, itself, looked
18 at the -- at the prologue to the statute, it even looked at a
19 separate but related statute in interpreting the statute to
20 determine what the focus was.

21 And at the end of the day, your Honor, I -- Google
22 doesn't think it matters that we need to fedachize (ph) a
23 particular word as the focus of the statute, it's pretty clear
24 that 2703 focuses on balancing law-enforcement equities with
25 individual privacy --

1 THE COURT: Well --

2 MR. HINNEN: -- and that as a result of that, it uses
3 different kinds of process with different procedures and
4 different safeguards to obtain -- to all the Government -- to
5 obtain different kinds of user communications. And the question
6 at the end of the day will be, what conduct is relevant to that
7 balance or to that.

8 THE COURT: There's -- I guess -- I guess, as you well
9 know, Judge Rueter basically, found that -- you know -- the
10 relevant conduct here is what happened in the United States,
11 where the -- where the data was produced.

12 MR. HINNEN: Correct.

13 THE COURT: And, you know, so the question is, if it
14 doesn't matter to you, isn't it the relevant conduct for
15 purposes of 2703, compel disclosure of the fact that you have a
16 U.S. target of an investigation, you have -- that target -- who
17 created the data -- created the data -- in the United States
18 presumably, right?

19 You have the United States, who has properly obtained
20 a warrant-- a warrant -- for these two investigations in the
21 United States. And then, you have no matter where the
22 information is in the world, basically, I think, everybody
23 agrees that the people who have to retrieve the data are within
24 the United States -- at a computer someplace in the United
25 States -- who will be reassembling the data.

1 So -- so, the -- the point being which he reached is
2 that this is a domestic obligation of the search-warrant
3 requirement under the statute.

4 MR. HINNEN: Yes, your Honor and --

5 THE COURT: So, why -- why are you saying that, this
6 is an extraterritorial obligation of the statute when all of the
7 activity is -- is happening in the United States, the only thing
8 that happens is that Google -- for their own business reasons --
9 kind of took the information and stored it someplace else,
10 because it may be promoting the interests of performance,
11 reliability and, I guess, costs, it may be cheaper to -- to
12 store it someplace else.

13 MR. HINNEN: So, there is a lot packed in to the
14 question, your Honor, let -- let me see if I can kind of unpack
15 it, piece by piece.

16 First with respect to Magistrate Judge Rueter's
17 analysis, that's actually where he erred, when he got to the
18 question that the Morrison test requires a court to ask in Step
19 2, where does the conduct relevant to the focus of the statute
20 occur, he limited his analysis to where does a constitutional
21 search or seizure occur.

22 And if you'd look at his opinion, he cites several
23 cases that talk about where a Fourth Amendment decision occurs.
24 He ends up, actually, looking at -- you know -- when an officer
25 conducting a physical search of a house can look at the serial

1 number of a turntable to try and determine whether -- whether a
2 search occurs outside the United States as part of the Morrison
3 analysis. The Morrison analysis is expressly not a
4 constitutional analysis, it's a statutory analysis.

5 And where he went off the rails, if you will, your
6 Honor, is where he limited his query to:

7 Well, where does a constitutional search or
8 seizure exist?

9 What Morrison requires is a court to determine whether
10 any conduct relevant to the focus of the statute occurs outside
11 the United States and --

12 THE COURT: So, you mean -- so, what is the critical
13 conduct --

14 MR. HINNEN: That occurs outside of the United --

15 THE COURT: -- that occurs outside the United States,
16 that you think makes the Government's life impossible to getting
17 this information?

18 MR. HINNEN: It's -- it's the parts -- the essential
19 parts of executing the warrant issued under the Stored
20 Communications Act, that have to occur outside the United States
21 with respect to data stored outside the United States. So, it's
22 Google accessing a data center that's located out --

23 THE COURT: But you will agree with me, that access
24 -- Google has access -- authorized access -- under the statute,
25 they have access?

1 MR. HINNEN: Yes, your Honor.

2 THE COURT: They could access the information at any
3 point in time, anywhere in -- any conditions they have for the
4 -- and -- so, you agree with that?

5 MR. HINNEN: They could, yes, your Honor.

6 THE COURT: And access means just the fact that they
7 may have the ability to locate where the information is?

8 MR. HINNEN: Yes, your Honor.

9 THE COURT: All right.

10 And the statute based upon probable cause authorizes
11 the Government with a warrant to get the information, right?

12 MR. HINNEN: Well, I think, we're here, your Honor, to
13 determine what information the warrant authorizes the Government
14 to get.

15 THE COURT: But -- but the information -- the
16 information -- if I understood correctly, your previous answer
17 to my question, the information is gathered -- is spread -- it's
18 spread or gathered throughout the world in non-readable -- non-
19 readable formats, so, it's meaningless to anybody else, who is
20 going to go out to wherever it is to get it, right?

21 MR. HINNEN: Some of it is, your Honor, yes. Some of
22 it is stored in a different format and it would be meaningful in
23 its native stored format.

24 THE COURT: So, if -- if -- this is what I'm getting
25 at, I think that if, for example, I agree with you, that this is

1 an extraterritorial application of the Stored Communications
2 Act, the Government would never be able to get this
3 information --

4 MR. HINNEN: That's --

5 THE COURT: -- right?

6 MR. HINNEN: -- that's possible with respect to some
7 of it, your Honor.

8 THE COURT: And your argument is well, then, go to
9 Congress and have Congress kind of deal with the issue, right?

10 MR. HINNEN: Yes, essentially, our argument is, it's a
11 statute that was written in 1986, when there was no global
12 Internet and there was no set of global communications network,
13 it doesn't apply appropriately to modern technology that
14 Congress should amend the statute and make sure that it does.

15 THE COURT: There is something that has been bugging
16 me for a little while and maybe, you have the answer, maybe, you
17 don't.

18 It's why the sudden change, why in -- in 2017 -- the
19 Internet service providers are taking the position, that they're
20 not going to produce any information that is outside -- out of
21 the jurisdiction of the United States overseas, when you have
22 been producing this for decades, even though the technology has
23 been changing rapidly?

24 MR. HINNEN: Yeah, I -- I think it's the -- the --
25 Microsoft, in a word, your Honor.

1 A circuit court of the United States caused everyone
2 to scrutinize this question with a degree of care, that -- that
3 they hadn't, perhaps, scrutinized it before. And that caused a
4 searching inquiry in to the meaning of the statute and its
5 application to modern technology.

6 And the result of that for many -- many --
7 communication service providers, not all of them, because
8 different providers have different network architectures and
9 store their data in -- in different ways, but for many of them,
10 the answer to that question was, gosh, this statute that was
11 written thirty-one years ago, when the Internet was a U.S.-only
12 endeavor -- well, the Internet wasn't even born yet -- but even
13 -- even predecessor services like, e-mail were publicly-
14 available only in the United States, it just doesn't work any
15 more with respect to modern communications networks.

16 THE COURT: Quickly on -- on the Microsoft opinion, is
17 -- it certainly is not binding upon me?

18 MR. HINNEN: That's correct, your Honor, it's an out
19 of circuit precedent.

20 THE COURT: And the question I have is, I know, I read
21 the opinion and I know there was three people, who felt that
22 they -- to have argument -- because they have strong opinions
23 about whether or not, the majority was right. In fact, they
24 believe, the majority was wrong, because they believe that --
25 they took the position -- that all of the data indicates -- the

1 opinion indicates -- that this was a domestic application of the
2 Stored Communications Act, why are they wrong?

3 MR. HINNEN: Well, I was -- I'm sorry --

4 THE COURT: Why -- why are the -- why is the dissent
5 wrong, I mean, those were vigorously dissenting opinions --

6 MR. HINNEN: Yeah.

7 THE COURT: -- on the merits, although -- although
8 they were taking the position, that this is a request for an *en*
9 *banc* argument and it was a split, so it was -- it was highly --
10 this issue was highly contested --

11 MR. HINNEN: Absolutely, your Honor.

12 THE COURT: -- in the Second Circuit.

13 And one of the people, who wrote a concurring opinion,
14 articulated reasons why this is an important issue and a "C"
15 change in the *jurisprudence* in terms of seeking warrants --
16 seeking the ability of preventing the Government from conducting
17 legitimate investigations of American citizens, who are
18 committing some serious crimes.

19 MR. HINNEN: Sure.

20 The reason, your -- they're wrong, your Honor, I
21 think, is the substance of our briefing and our argument, they
22 just simply misapply the second factor of the -- of the Morrison
23 test.

24 And I think failed to comprehend the significance of
25 Congress's requirement that with respect to communications

1 content, the Government must obtain a warrant with all of the
2 procedures and safeguards that that implies.

3 And so, that's why I think, they're wrong and I'll
4 speak to that at -- in much -- not much greater, but somewhat
5 greater lengths than --

6 THE COURT: Right.

7 MR. HINNEN: -- in my argument.

8 THE COURT: So, at that point -- at that point, as you
9 well know, assuming the focus of the Stored Communications Act
10 and/or Section 23 -- 2703 is privacy as Judge Rueter asked you,
11 I think, in the argument and I'll ask you again here is:

12 Is where does the interference with the customers
13 privacy occurred, when the electronic communications are
14 disclosed to the Government or at some point else -- or some
15 point else in time, when we --

16 MR. HINNEN: Sure.

17 THE COURT: -- know what they're going to get is
18 gibberish?

19 MR. HINNEN: So, I don't -- I don't think, it's an
20 either/or question, necessarily, your Honor, I think that the
21 issuance of a warrant initiates a process of interference with
22 the individual's privacy interest in their communications.

23 THE COURT: But -- but the warrant protects that --

24 MR. HINNEN: The warrant does protect that --

25 THE COURT: -- is issuing of the warrant protects --

1 MR. HINNEN: -- the warrant does protect that --

2 THE COURT: -- it's a balancing act.

3 MR. HINNEN: -- and I don't want to go down the Fourth
4 Amendment rabbit hole --

5 THE COURT: Yeah, right.

6 MR. HINNEN: -- that Judge Rueter did.

7 The question is, what is the conduct that's relevant
8 to that process and it involves the issuance of the warrant, the
9 service of the warrant on the provider and then, the provider's
10 execution of the warrant by searching its relevant data centers,
11 isolating responsive data, compiling that responsive data and
12 returning that responsive data to the United States.

13 And all of those four steps that are an essential part
14 the process, the Government does not get the communications
15 unless they occur, occur outside of the United States with
16 respect to data that's stored outside of the United States.

17 And I think, if you -- I think, you asked a user of
18 Google services or that kind of thing, if you said to a user,
19 you know, User, we've -- we've searched all of our data centers
20 around the world, we've gathered together your data and we've
21 brought it back to the United States under the compulsion of a
22 warrant and we haven't yet disclosed it, do you have any
23 interest that's been impacted by that? Do you feel like your
24 privacy has been affected at all by the fact that we've searched
25 our networks all over the world under the compulsion of a

1 Government warrant --

2 THE COURT: But you said -- you said -- that -- this
3 is an issue -- and something that, perhaps, you could help me
4 understand a little.

5 You -- Google -- for their own business reasons,
6 right --

7 MR. HINNEN: Correct.

8 THE COURT: -- for their own business reasons, took
9 that information of a customer and spread it around the world,
10 right, you didn't have to do that, I assume you could have kept
11 it in the United States, but you spread it around the world for
12 business reasons.

13 MR. HINNEN: Correct.

14 THE COURT: Some of these customers don't even know
15 that you've spread it around the world. You did not interfere
16 with their use of the information, right, because they would
17 have access to all the data?

18 MR. HINNEN: That's correct.

19 THE COURT: And -- and -- and Google's access -- right
20 of access and right to the information is not interfered in any
21 shape -- or way of form, right?

22 MR. HINNEN: Except for the fact, that Google is
23 compelled to undertake these steps in -- in compliance with the
24 warrant, but yes --

25 THE COURT: Yes.

1 MR. HINNEN: -- the way its services work and are
2 provided to the customer are not affected by -- by the
3 compliance that it engages in to comply with the warrant.

4 THE COURT: So, where is the interference with the
5 right of privacy, isn't it at the point in time, where you kind
6 of duplicate the information and give it to the Government and
7 -- and the Government now -- because they didn't interfere with
8 your right of access, they didn't interfere with your right to
9 possess the -- the information nor the customer.

10 What you've done is copied the information in whatever
11 format, given it to the -- at that point in time, the seizure --
12 the -- at that point in time, the Government has it, it's
13 disclosed to the Government pursuant to the warrant, for the
14 legitimate investigatory reasons, because they're conducting a
15 criminal investigation.

16 MR. HINNEN: I -- I think, the interference with the
17 right of privacy is when the Government compels the provider to
18 engage in a process, that results in the production of the --

19 THE COURT: They -- they compel disclosures based upon
20 probable -- this is -- the --

21 MR. HINNEN: Absolutely.

22 THE COURT: -- Government is compelling you, because
23 they know you have the information and they have probable cause
24 that a crime is committed --

25 MR. HINNEN: That's right, your Honor.

1 THE COURT: -- and that is evidence of a crime.

2 So, we -- we compel people all the time.

3 MR. HINNEN: That's right, your Honor.

4 And -- and that's why Judge Lynch was right, that this
5 case is not fundamentally about privacy, this case is
6 fundamentally about where the conduct, the statute compels a
7 provider to engage in occurs. It's not a Fourth Amendment
8 question, it's just a question of what steps are necessary for
9 the provider to implement the statute and whether any of those
10 steps take place outside the United States.

11 THE COURT: All right.

12 So, maybe -- maybe -- maybe, I'm a little bit slow on
13 this thing.

14 But the Government compels the disclosure and somebody
15 sitting at a computer someplace in the United States comes up
16 with a program and, bingo, from the United States they produce
17 it pursuant to the warrant.

18 How is that -- why is that not a relevant point of --
19 of the --

20 MR. HINNEN: Well --

21 THE COURT: -- the critical point relevant to the
22 purposes of the statute?

23 MR. HINNEN: Yeah.

24 I -- I think the answer, your Honor, is because it --
25 that analysis skips several essential and compelled steps, so

1 first the --

2 THE COURT: It doesn't matter, the whole thing is
3 compelled.

4 MR. HINNEN: That's correct.

5 THE COURT: -- from the beginning, it doesn't matter
6 what --

7 MR. HINNEN: -- that's correct and that's -- that's
8 why every step of the process has to occur inside the United
9 States or it's an improper extraterritorial a --

10 THE COURT: All of it -- all of it --

11 MR. HINNEN: All of it.

12 THE COURT: -- a hundred percent of it?

13 MR. HINNEN: Absolutely, that's what Morrison says.

14 THE COURT: Morrison --

15 MR. HINNEN: It --

16 THE COURT: -- first of all, Morrison, I think I read
17 Morrison regarding the extraterritorial application of the --
18 the Foreign Exchange Commission law, that statute law --

19 MR. HINNEN: Hm-hmm.

20 THE COURT: -- for that statute.

21 MR. HINNEN: Correct.

22 THE COURT: And I don't -- I don't even think that
23 this is -- that -- well, I'm not so sure, that -- that, because
24 that -- the Government's position is not that -- that that is --
25 that this statute applies, the extraterritorial, the

1 Government's position is that this is a domestic application of
2 statute and that you look to -- to the relevant conduct for the
3 purposes of the statute, which is privacy or balancing, whatever
4 -- the law-enforcement balancing, that the -- the conduct occurs
5 here in the United States, including the retrieval and the
6 assembling of the information in whatever format to be turned
7 over to the Government.

8 MR. HINNEN: So, I -- I don't think --

9 THE COURT: So -- so, you mean to say that, just
10 because somebody has to reach out and get that information that
11 you sent abroad back into the warehouse or into the -- the
12 network, that that is -- is fatal, for purposes of the statute?

13 MR. HINNEN: I -- yes, your Honor, the only -- the
14 only part of that, I might take issue with is -- is the just
15 because, that's the whole ball game with respect to data that's
16 stored overseas.

17 THE COURT: Morrison was a foreign --

18 MR. HINNEN: Correct.

19 THE COURT: -- a foreigner --

20 MR. HINNEN: Correct.

21 THE COURT: -- who brought a class action in the
22 United States getting access under that law in the United
23 States --

24 MR. HINNEN: Yes.

25 THE COURT: -- because they felt that they were

1 cheated, right? And the court said, you do not have a claim,
2 because all of the conduct occurred in the United States, it --
3 he bought the stocks in the foreign exchange in conduct, even
4 though some of the conduct here impacted. Obviously, they
5 wouldn't have filed a lawsuit here, if they would have not been
6 aggrieved.

7 MR. HINNEN: Yes.

8 THE COURT: And the Supreme Court said, no, that's --
9 you know, you're out of -- you can't come to -- you don't have a
10 case.

11 MR. HINNEN: Right.

12 So, I think the analysis in Morrison is not
13 particularly -- the specific analysis in Morrison -- is not
14 particularly relevant to this case. The test and the framework,
15 ah, established in Morrison is -- is directly relevant to this
16 case.

17 And your Honor, I'd point it's -- it's cited on --

18 THE COURT: But the test doesn't say, if one little
19 piece of -- of relevant conduct occurs overseas, that the whole
20 ball of wax -- that the whole statute is out.

21 MR. HINNEN: It does say, that the conduct relevant to
22 the focus of the statute -- not the focus of the statute, itself
23 -- the conduct relevant to the focus of the statute, all of the
24 conduct relevant to the focus of the statute must occur in the
25 United States and --

1 THE COURT: But it does, right, because all they do is
2 retrieve stuff that is -- in unreadable form -- from wherever.

3 MR. HINNEN: The --

4 THE COURT: Look, let me see if -- if it was in a
5 satellite, you'd google now a satellite and you send it to the
6 satellite, would that be outside the bounds?

7 MR. HINNEN: It depends --

8 (Laughter at 10:32 a.m.)

9 MR. HINNEN: -- I am assuming the satellite is outside
10 U.S. air space for the purposes of our hypothetical, your Honor?

11 (Laughter continues.)

12 THE COURT: All right.

13 But -- but put it wherever you want.

14 (Whispering held off the record.)

15 MR. HINNEN: Ah, under the current statute, yes, I
16 don't think Congress anticipated storing documents on satellites
17 in 1986, anymore than it anticipated that Google might store
18 them in France or England.

19 THE COURT: Right.

20 You're storing someplace where you've got a room, you
21 might be looking at -- at that space --

22 MR. HINNEN: The data center on the moon, your Honor,
23 yes.

24 THE COURT: -- but your argument would be the same,
25 it's outside of the territory of the United States, no country

1 could claim it, but the United States cannot claim it, either.

2 MR. HINNEN: Certainly, our argument would still be
3 that before we'd get into data -- data center in space, your
4 Honor, the statute needs to be amended, because Congress wasn't
5 thinking about that in 1986.

6 THE COURT: Okay.

7 MR. HINNEN: And, your Honor, you asked, well, where
8 -- where does Morrison say that, you know, all of the relevant
9 conduct has to be in the United States?

10 The Supreme Court -- the best and most concise place,
11 the Supreme Court says, it is actually in the RJR Nabisco case
12 and it's at Page 2090 and it's on Page 9 --

13 THE COURT: I have it.

14 MR. HINNEN: -- of our reply. And I think that --
15 that might be helpful.

16 I want to loop back really briefly, you asked me a
17 couple of questions about why Magistrate Reuter's analysis was
18 -- was incorrect and you listed a number of factors that
19 occurred in the United States --

20 THE COURT: Right.

21 MR. HINNEN: -- the personnel are in the United
22 States, the criminals are in the United States, those kind of
23 things, right, Judge Rueter cites to those as well and relies on
24 them to some degree.

25 Those would be perfectly rational factors to consider

1 in constructing a statute and Congress could expressly have
2 taken those issues into account and said, if the following
3 factors are in the United States, it doesn't matter whether it's
4 in the United States or outside of the United States, the data,
5 itself, is stored inside or outside the United States.

6 That would be a very different statute than Congress
7 wrote in 1986, when it enacted the SCA, those factors don't
8 appear anywhere in -- in the statute. And even if they did,
9 they would obviate the fact that the Morrison test as
10 articulated in the RJR Nabisco case requires all relevant
11 conduct to occur in the United States.

12 (Pause and whispering held off the record at 10:34
13 a.m.)

14 THE COURT: Okay.

15 MR. HINNEN: And the one other -- the one other thing,
16 I would say about Magistrate Judge Rueter's decision is, he
17 spends some time focusing on some of the unusual and in some
18 ways, un --

19 THE COURT: Well, hold on a minute.

20 MR. HINNEN: Sure.

21 THE COURT: You're talking about Morrison and in
22 Nabisco I'm going to read to you what does -- whatever this
23 means, in Nabisco, the two-step framework, is the:

24 So, at the first step, we asked whether the
25 presumption against extraterritoriality has been

1 rebutted --

2 That is, whether the statute is a clear and
3 affirmative indications that it applies extraterritorially.

4 -- we must ask the question regardless of whether
5 the statute in question relates conduct, affords
6 relief or merely confers jurisdiction.

7 If the statute is not extraterritorial --

8 Which I don't think the Government is debating that.

9 -- then, at the second step, we determine whether
10 the case involves a domestic application of the statute.
11 And we'd do this by looking at the statute's focus, if
12 the conduct relevant to the statute's focus occurred in
13 the United States, then the case involves a permissible
14 domestic application even if, other conduct occurred
15 abroad. But if the conduct relevant to the focus
16 occurred in a foreign country, then the case involved
17 impermissible extraterritorial application, regardless
18 of any other conduct that occurred in U.S. territory.

19 I've read that correctly, that is the test, right?

20 MR. HINNEN: That's -- that's exactly the test, I have
21 in mind, your Honor.

22 THE COURT: So, going back to my previous question --

23 MR. HINNEN: Yes.

24 THE COURT: -- ninety-nine percent of the conduct
25 happened here, except that -- that you developed the program and

1 you retrieve the information from wherever it was, multiple
2 countries at -- from different times.

3 So, even if that conduct happened, doesn't -- is this
4 still a domestic application of the statute?

5 MR. HINNEN: So -- so, I would say, no, for two
6 reasons, your Honor.

7 First, I would say that ninety-nine percent of the
8 conduct with respect to data stored in a foreign data center
9 does not occur in the United States. I wouldn't say that,
10 ninety-nine percent of it occurs outside the United States, but
11 I'd say, the vast majority of it occurs outside the United
12 States. All that happens from the United States is the
13 individual queries, the foreign network.

14 THE COURT: But that's significant, because I gave you
15 -- I -- because you have access to the whole ball of wax, you
16 sent it there.

17 MR. HINNEN: It -- it's significant. But it's not the
18 majority -- you know, it's sort of not the majority of the
19 activity involved in identifying, isolating and retrieving data
20 stored in foreign data centers.

21 All of that conduct which is conduct undeniably,
22 conduct relevant to the execution of a warrant issued under the
23 Stored Communications Act occurs in the data center outside the
24 United States, where the server says, okay, you've asked me, do
25 I have any data that applies to Count X, let me look through the

1 data in my data center, I do, I have the following documents.

2 Then, you can imagine another query, okay, please
3 isolate those documents. Okay, I've isolated those documents.
4 Okay, please send those documents from your data center in --
5 let's say -- France to the United States, so that they can be
6 produced.

7 All of that computing, all of that isolation, all of
8 that compilation, all of that transmission occurs from the
9 foreign data center, that's the -- those are the essential steps
10 necessary to produce the data from a foreign data center.

11 The fact that the person happens to be sitting here --
12 the person is almost irrelevant -- the fact that the person
13 happens to be sitting at a keyboard in California --

14 THE COURT: But that --

15 MR. HINNEN: -- is a very small part of the process --

16 THE COURT: -- would -- take the person out, could you
17 do anything without the -- the -- could you do anything with
18 that person -- it seems to me, that you're pushing the envelope
19 a little bit here. Because you can't do anything without that
20 person, nothing could be retrieved whether in the United States
21 or outside of the United States without that person.

22 MR. HINNEN: That's true, your Honor, but it's also
23 true of the foreign data center, I couldn't do any of those
24 things without the foreign data center searching its data,
25 isolating its data, compiling its data and transmitting its

1 data, either.

2 So, I agree with you that the person, who initiates
3 the query is an -- is an essential part of the process, it's --

4 THE COURT: He is the key to the process, isn't he?

5 MR. HINNEN: Ah --

6 THE COURT: You -- IT people are becoming
7 indispensable to the process and he's sitting at a computer
8 someplace in California, developing the program and retrieving
9 the information, even if the information was in space.

10 MR. HINNEN: He is a necessary part of the process,
11 he's not -- he is not a sufficient part of the process, in other
12 words, without --

13 THE COURT: Well, hold on a minute, hold on a minute.

14 MR. HINNEN: Okay.

15 THE COURT: How many people do you need to retrieve
16 this information?

17 MR. HINNEN: Ah, usually, I think, it -- it varies,
18 because different people specialize in the different services --

19 THE COURT: All right.

20 MR. HINNEN: -- but a small number of people.

21 THE COURT: All right.

22 And they all are where?

23 MR. HINNEN: They are all in California, your Honor.

24 THE COURT: All right.

25 So, they are the key essential personnel for -- for

1 you to comply with the warrant, right?

2 THE DEFENDANT: That's correct, your Honor.

3 THE COURT: And they are all here?

4 MR. HINNEN: That's correct, your Honor.

5 THE COURT: Does it matter where the information is?

6 MR. HINNEN: Yes, your Honor.

7 THE COURT: All right.

8 (Laughter at 10:39 a.m.)

9 MR. HINNEN: And -- and Congress, certainly, could
10 have written a statute that says, as long as the person is
11 located in the United States, ah, you know, data from anywhere
12 in the world, can be retrieved and produced. But Congress --
13 but Congress --

14 THE COURT: Right.

15 MR. HINNEN: -- didn't write that statute.

16 THE COURT: So, on the steps that occurred abroad, at
17 least, you say, you're -- you're trying to -- if I understand
18 your argument correctly, you say, even though this person is
19 here, there's a lot of steps that are occurring abroad, the
20 searching foreign data centers, right --

21 MR. HINNEN: Correct.

22 THE COURT: -- isolating the data, compiling the data
23 and then, assembling to be returned, okay, did I miss any steps?

24 MR. HINNEN: No, your Honor that --

25 THE COURT: Those -- those are the three essential

1 steps, locating it -- I am not going to use word, search --

2 MR. HINNEN: That's fine.

3 THE COURT: -- I'm going to use locating or finding
4 it, because --

5 MR. HINNEN: Yes.

6 THE COURT: -- that's access --

7 MR. HINNEN: Yes.

8 THE COURT: -- that you have.

9 Isolating it, right --

10 MR. HINNEN: Correct.

11 THE COURT: -- to make sure that it covers the period
12 of time between Day 1 and Day 30, whatever.

13 MR. HINNEN: And that it applies to a Count X, that's
14 subject to the --

15 THE COURT: Right.

16 MR. HINNEN: -- warrant, not at Count Y.

17 THE COURT: And then, returning it in some readable
18 form to the United States, those are the three -- or four --
19 essential steps, right?

20 MR. HINNEN: They're -- and, your Honor, neither of us
21 are computer scientists, but very generally speaking, yes, I
22 think that's accurate.

23 THE COURT: But developing the program -- the writing
24 of the program, that is going to allow you to take all of those
25 steps that happened here --

1 MR. HINNEN: That's correct.

2 THE COURT: -- with the limited number of people that
3 you have that are sitting someplace in -- in Google's
4 brainstorming and developing a program that is going to be
5 responsive to the -- the warrant?

6 MR. HINNEN: Well, I'm -- I'm not sure about that,
7 actually, your Honor, I -- I should pause.

8 Google has development people all over the world and I
9 don't know where they -- where they write the scripts and
10 whether there are any foreign personnel involved in that
11 process.

12 THE COURT: Okay.

13 MR. HINNEN: I -- I don't -- I would argue that where
14 the query is written is relevant to the Morrison analysis, but I
15 don't know as a matter of fact whether anyone outside the United
16 States was -- was involved in writing these queries or not.

17 THE COURT: Right. So, you don't know that?

18 MR. HINNEN: I don't know that, your Honor.

19 THE COURT: Okay.

20 MR. HINNEN: I -- I would say that, when they're
21 writing that query, they'd have to determine whether it will be
22 limited to data centers in the United States or whether, in
23 fact, it will also apply to data centers outside the United
24 States.

25 THE COURT: Okay.

1 Now, what server is running the application that you
2 have developed to be responsive to -- to the subpoena, is that
3 service whether in the United States or outside of the United
4 States, where is the server that you used to produce the
5 information?

6 MR. HINNEN: It's -- it's both, your Honor.

7 And that's -- that's what I was sort of trying to get
8 at with my dialogue between the server in the United States and
9 the server overseas.

10 The small computer programmer, the script would cause
11 the computer in California to say to data centers wherever the
12 script told it to, do you have any data that falls within the
13 scope of this warrant?

14 THE COURT: All right.

15 MR. HINNEN: And if it did, then that -- in our
16 example, that foreign data center would have to say, yes, I do.

17 So, it's a process that has to run on both servers
18 because if it doesn't, then the server in California or the
19 computer in California is blind to what is on the server outside
20 the United States.

21 THE COURT: And then, I am going to repeat the
22 question and give you another shot at it --

23 MR. HINNEN: Thank you, your Honor.

24 THE COURT: -- but where does it interfere with the
25 customers' privacy occur, something that Judge Rueter has asked

1 and -- and you still maintain that -- where is the privacy
2 violation?

3 MR. HINNEN: It's a result of the process of obtaining
4 the warrant and compelling --

5 THE COURT: When does it begin and when does it end?

6 MR. HINNEN: It -- it begins when the Government
7 obtains a warrant compelling a provider that has a relationship
8 of trust with a user to go out and search its network --

9 THE COURT: But the Government has probable cause --

10 MR. HINNEN: I agree, your Honor.

11 THE COURT: -- and that trumps -- that protects
12 privacy.

13 MR. HINNEN: Absolutely, your Honor, and for --

14 THE COURT: I mean, the Government has a warrant that
15 protects privacy.

16 MR. HINNEN: That's right, your Honor.

17 And for that reason, Google is not contesting any of
18 the searches that needed to be conducted inside the United
19 States, because Google recognizes that in the United States, a
20 warrant is the gold standard with respect to privacy.

21 So, this issue is -- is not about -- for Google --
22 whether a warrant adequately protects privacy, it's about
23 whether a warrant can compel the production of documents that
24 are stored outside the United States.

25 THE COURT: So, if I understand it correctly, you are

1 taking the position, that the point of access or the location of
2 where the Google legal investigation support personnel gains
3 access to the information and brings it back to the United
4 States is not relevant, that the relevant conduct is what
5 happens at the various overseas or at the various data centers
6 where the data is stored?

7 MR. HINNEN: I'm -- I'm not saying, your Honor, that
8 none of the conduct that occurs in the United States is
9 relevant. I am only saying that --

10 THE COURT: But that's the --

11 MR. HINNEN: -- the conduct that occurs outside the
12 United States is relevant to the focus of the statute as well.

13 THE COURT: -- but it's really because the information
14 is still there, because you sent it there --

15 MR. HINNEN: That's correct, your Honor and --

16 THE COURT: -- you put it outside the reach of the
17 Government.

18 MR. HINNEN: That's correct, your Honor.

19 And in -- in this -- there are areas in which Congress
20 tells service providers how to behave, it says in Colea (ph) for
21 instance --

22 THE COURT: That's -- it's all communications, one of
23 those areas.

24 MR. HINNEN: It's not, your Honor, no.

25 The Stored Communications Act takes a service provider

1 as it finds it.

2 If Google stored none of this data and the Government
3 served a warrant, there would be nothing wrong with Google
4 saying, I'm sorry, we have none of that data.

5 THE COURT: Okay.

6 MR. HINNEN: There's -- there's nothing that the
7 Stored Communications Act requires a communication service
8 provider to do, other than protect the privacy of its customers'
9 records and communications, unless and until a piece of legal
10 process is issued under 2703 and a process is begun that results
11 in the disclosure of -- of that information.

12 THE COURT: So -- so, if I understand it, it's a
13 compelled process and whether or not, it's stored overseas is a
14 relevant determining factor in deciding whether the -- the
15 customer's privacy was invaded from your perspective, right?

16 MR. HINNEN: It -- it's conduct relevant to the focus
17 of the statute, yes, your Honor --

18 THE COURT: All right --

19 MR. HINNEN: -- it's part --

20 THE COURT: -- all right.

21 MR. HINNEN: -- an essential part of the process.

22 THE COURT: All right.

23 But it -- but I've read the statute, I've read the
24 test before and it seems to me, that even -- even if the conduct
25 relevant to the focus of -- some foreign country, not -- not

1 necessarily -- well, I will hear the Government, they're going
2 to respond.

3 But my question is, the citizenship of the person
4 doesn't matter, right?

5 MR. HINNEN: That's correct, your Honor.

6 THE COURT: So, even if it's a foreign citizen, that
7 -- that is not relevant at all?

8 MR. HINNEN: No, under the current statute, your
9 Honor.

10 That would be a factor Congress could consider
11 incorporating into an amended statute and might want to, given
12 the fact that the Internet is now global. But under the --
13 under the current statute, it doesn't speak to the citizenship
14 of the -- of the user or subscriber at all.

15 THE COURT: All right.

16 You will agree that some of the -- the privacy concern
17 addressed in the statute is the unauthorized access and the
18 disclosure of the customers information, right?

19 MR. HINNEN: I think the focus of the statute, your
20 Honor, is -- that is the -- that is the privacy concern
21 addressed in the statute, yes, your Honor.

22 THE COURT: Okay.

23 So, if Google is authorized to -- as to the customers
24 at any point in time, isn't then, the appropriate focus as to
25 whether the disclosure occurs?

1 MR. HINNEN: I don't think so, your Honor. I think the
2 appropriate focus is on exactly what Section 2703 sets forth
3 which is a process for the Government to compel a provider to
4 engage in a process, that results in the disclosure of
5 communications. And that process, it's -- it follows pursuant
6 to a warrant, it involves lower cases s's, here your Honor, it
7 involves a search and seizure or in your Honor's terms, it
8 involves an inquiry and a consolidation and a retrieval just to
9 stay away from Fourth Amendment terms.

10 THE COURT: Yeah, but it -- so, the access -- you have
11 a right of access and -- and access means to be able to find
12 something, of course, if you find something, you'd have to look
13 at it, right?

14 It -- it doesn't mean searching, you -- you know, the
15 Government does the searching after they get the -- the document
16 or the information, the Government rifles through it very
17 carefully to find out whether there is any evidence of a crime,
18 that's a search. What you do is just grant access to the data,
19 right? It's a little bit -- it's --

20 MR. HINNEN: Well --

21 THE COURT: -- it's part of the process, it's a step
22 but it's not the equivalent of what we'd call a traditional
23 search and seizure.

24 MR. HINNEN: I don't think -- and, your Honor, I don't
25 think we'd need to answer that question from a Fourth-Amendment

1 perspective today.

2 Certainly, Google separates the communications with
3 respect to that particular user from the communications of its
4 hundreds of millions of other users in data centers all around
5 the world.

6 So, it identifies -- just to approximate -- it
7 identifies the .0001 percent of the data and communications on
8 its network, that are responsive to that particular thing and
9 separates it out, whether we'd want to call that a search or
10 whether we'd want to call it --

11 THE COURT: Excuse me, that's not necessarily, the
12 search --

13 MR. HINNEN: -- and finding --

14 THE COURT: -- that's totally something -- and that's
15 what you'd do in locating it for -- for the Government in
16 response to the warrant.

17 MR. HINNEN: And, again, your Honor, I'm happy to call
18 it anything, because for the purposes of the Morrison analysis,
19 it doesn't matter whether it's a Fourth-Amendment search, it
20 only matters whether it's conduct relevant to the focus of the
21 statute and it very clearly is that, the statute just could not
22 function, if that step didn't occur.

23 THE COURT: So, if -- if I accept your argument, your
24 logical conclusion is, the Government is out of luck, they will
25 never be able to get anything from Google that is stored

1 overseas, because you have it spread all over the world.

2 And there was an indication in the stipulation, that
3 some of the stuff -- or customers' account data -- may be spread
4 in multiple countries, even one piece of information may be
5 spread throughout the world --

6 MR. HINNEN: That's correct, your Honor and -- and --

7 THE COURT: -- and they're out of luck.

8 MR. HINNEN: They're out of luck until Congress amends
9 the statute, yes. So, it's thirty-one years after it was
10 passed, it's -- it's long overdue to sort of catch up with
11 modern technology.

12 And yes, as the statute currently applies to a global
13 network, unfortunately, one of the ramifications of the statute
14 Congress wrote in 1986, is that that information is not
15 accessible to the Government.

16 THE COURT: And even though the 2703, it compels
17 disclosure based upon probable cause, you -- your position is
18 that, because it is compelled and you have take all of these
19 steps, that -- that anything that is in the United States is --
20 it's fair game, but anything that is outside of the United
21 States is not relevant to the inquiry?

22 MR. HINNEN: That's correct, your Honor.

23 2703 with respect to data stored outside the United
24 States, requires a service provider to take steps outside the
25 United States and it --

1 THE COURT: No, no, no --

2 MR. HINNEN: -- and it couldn't work, if it didn't.

3 THE COURT: -- the information is outside the United
4 -- the information is outside the United States, they're here,
5 whichever provider --

6 MR. HINNEN: The -- the conduct is outside the United
7 States, the -- the finding, the iso --

8 THE COURT: But you said, the infor -- the data that
9 you for business reasons sent outside of the U.S. territory is
10 someplace else, but Microsoft, all the IT people, all the --
11 with the -- with the intelligence, all the people that are going
12 to write the program and apply that program and retrieve that
13 information, in pretty relative -- short order -- are here in
14 the United States.

15 MR. HINNEN: The people responsible for querying the
16 network and retrieving the documents --

17 THE COURT: Right.

18 MR. HINNEN: -- are here in the United States, yes.

19 THE COURT: Okay.

20 And -- and of course, we don't know -- look at how
21 much of the information is out -- we don't know, in terms of
22 these customers -- in terms of these customers' accounts, the
23 volume of information relative to volume of information that is
24 in the United States, it does not matter, right, it's not
25 relevant?

1 MR. HINNEN: Ah, it's rele -- it's relevant to -- I
2 think -- the impact it has on the Government's investigation, if
3 ninety percent of the data is in the United States and Google is
4 able to produce that, obviously, that's much more helpful to the
5 Government's investigation, than if only ten percent were in the
6 United States.

7 THE COURT: Okay. I think I see.

8 I was going to ask you a question regarding the
9 suggestion in the briefing, that enforcing the warrant required
10 the service provider to retrieve and disclose data that if
11 sought overseas might create a conflict with foreign law or
12 might require a service provider to violate foreign law.

13 Can you give me one example of how a conflict may
14 exist or -- or may be violated or -- or -- because I didn't see
15 any concrete example?

16 MR. HINNEN: Absolutely, your Honor.

17 THE COURT: Go ahead.

18 MR. HINNEN: Countries all over Europe and around the
19 world have what's called, blocking statutes and they prevent --
20 they prevent a court in the United States from requiring a
21 service provider in the United States to retrieve documents from
22 inside their jurisdiction for production in -- in a U.S.
23 procedure.

24 THE COURT: Well, regardless of whether it's a U.S.
25 citizen or not?

1 MR. HINNEN: Regardless of whether it's a U.S. citizen
2 or not, your Honor.

3 And one might speculate that those -- those statutes
4 are as out of date and as ill-suited to the modern Internet as
5 the SCA is and that they, too, should be amended, so that we'd
6 have a coherent framework that exists, not just in the United
7 States but in foreign countries.

8 But -- but, yes, it is prohibited under many -- many
9 European countries' blocking statutes and we'd be happy to
10 submit supplemental briefing on this, if it's important to your
11 Honor, prohibits the disclosure of data stored in those
12 countries outside of those countries pursuant to a court order
13 -- a U.S. court order.

14 THE COURT: Okay.

15 What data or what information does -- because what you
16 have is just -- what -- isn't it symbols and the numbers of
17 zeros which is stored in those -- in those data centers?

18 MR. HINNEN: Some of it is, some of it's -- some of it
19 is full e-mails. Sometimes, all of the pieces will be in one
20 data center, so it's easy to reassemble them in that one data
21 center, without going outside the -- the country, it really --
22 it really depends on the service and the particular technology.

23 THE COURT: All right.

24 I think I -- I interfered with your argument a lot,
25 but I am going to give you an opportunity to make your argument,

1 I think you've answered some of my questions.

2 MR. HINNEN: Great, thank you, your Honor.

3 And I'll -- I'll try to be very brief, because we have
4 had a chance to discuss this at some length at this point.

5 So, just sort of, I think, picking up where we left
6 off.

7 The second part of the Morrison test, the Government
8 -- the Magistrate Judge -- found and the Government has conceded
9 that in the first part, Congress did not intend for the Stored
10 Communications Act to apply extraterritorially.

11 So, as your Honor has pointed out, it has to be the
12 Government's position, that all of this is just a domestic
13 application and that no conduct relevant to --

14 THE COURT: Right.

15 MR. HINNEN: -- the statute occurs outside the United
16 States.

17 To parse that -- that quote from -- from RJR Nabisco a
18 little bit and we'd do this in our -- in our reply brief as
19 well, your Honor, where it talks about, even if other conduct
20 occurred abroad, that's very clearly distinguishing other
21 conduct from conduct relevant to the statute, the way that
22 sentence is structured.

23 So, if conduct relevant to the statute's focus
24 occurred in the United States, then the case involves a
25 permissible domestic application, even if other conduct -- other

1 conduct, not relevant to the focus of the statute -- occurred
2 abroad.

3 THE COURT: But that's not what it said, though.

4 MR. HINNEN: That's not, it's -- it's very clear from
5 the structure of the sentence, your Honor. There is no point --

6 THE COURT: If the conduct relevant to the statute's
7 focus occurred in the United States, then, the case
8 involves a permissible domestic application, even if
9 other conduct occurred abroad.

10 It doesn't say, even if other relevant -- it doesn't
11 say anything --

12 MR. HINNEN: I agree, it doesn't --

13 THE COURT: -- one way or the other.

14 MR. HINNEN: -- I agree it doesn't say it, your Honor,
15 but the only way the distinction makes sense, is if the other
16 conduct referred to in the second half of the sentence, is
17 distinguishing it from the relevant conduct referred to in the
18 first half of the sentence.

19 And I think it makes it even --

20 THE COURT: And the second half of the sentence
21 doesn't say, but if the conduct relevant to the focus occurred
22 in a foreign country -- it doesn't say where -- but if the
23 conduct relevant to the focus occurred in the foreign country,
24 meaning the conduct, right, it doesn't -- some of it could be
25 and some of it cannot be, right?

1 MR. HINNEN: It says, the conduct relevant to
2 the focus of the statute.

3 So, if -- if conduct relevant to the focus of the
4 statute occurred in a foreign country, then the case involves an
5 impermissible extraterritorial application.

6 THE COURT: And you are taking the position, that
7 means, the -- the -- any part of the conduct?

8 MR. HINNEN: That's correct, your Honor, there is no
9 distinction, there's no carve out, if any of the relevant
10 conduct occurs in the foreign country, then the case involves an
11 impermissible-extraterritorial application.

12 THE COURT: Okay. I think, I understand.

13 MR. HINNEN: Okay.

14 One -- one place, I think, other courts have made a
15 mistake and I think was part of the mistake that Magistrate
16 Judge Rueter made as well, is they've tried to determine just
17 where the focus of the statute exists. And they've said, well,
18 the focus of the statute is privacy, so where does privacy
19 exist?

20 It's the wrong question, it's not the question
21 Morrison asks the court to answer. What Morrison requires the
22 court to answer is, where does the conduct relevant to the focus
23 of that statute exist?

24 So, even if -- the impact on privacy occurred in the
25 United States at the time of disclosure, conduct relevant to

1 that disclosure occurs outside the United States, the process
2 without which that disclosure could not occur, several steps of
3 that process occur outside of the United States.

4 And so, we have a situation where conduct that is
5 required by the statute, no provider would be undertaking this
6 conduct, if -- if they weren't compelled to do so by a warrant.
7 No provider would be querying their network and saying, please,
8 give me all the e-mail for Todd Hinnen and send them back here
9 to me in the United States.

10 The conduct is required, the conduct is essential to
11 the effective functioning of the statute, so it's not only
12 relevant, but it's required and essential, it fits squarely
13 within the second prong of the Morrison test. And at the end of
14 the day, that's what is fatal to the Government's argument.

15 And the Government in order to prevail, has to argue
16 that the conduct the statute compels is not relevant to the
17 focus of the statute. It has to argue that the finding,
18 compiling, all of that kind of stuff, that the warrant requires
19 Google to undertake, isn't relevant to the focus of the statute,
20 because if it is and that conduct occurs outside the United
21 States, Morrison tells us, that's an impermissible-
22 extraterritorial application of the statute.

23 THE COURT: Very well. Thanks for your very technical
24 argument.

25 MR. HINNEN: Ah, I think we've covered most of that,

1 your Honor.

2 You know, we talk about this quite a bit in our
3 briefing, Congress's choice of the term, warrant is not at all
4 accidental, if you'd look at the structure of 2703, it provides
5 different kinds of legal process that involve different
6 procedures and different safeguards.

7 And with respect to the most sensitive kind of -- of
8 data, communications content, it requires a warrant, which
9 involves a process of execution and all that that entails.

10 And so, it intended to use -- as your Honor had said
11 -- that gold standard for privacy, the gold standard by virtue
12 of which the U.S. searches are constitutional in order to
13 protect those communications. And -- and with that term, when
14 Congress used it in 1986, it imports all that goes with the
15 warrant including the process of an execution and the search of
16 places in order to identify things, including the territorial
17 limitations and that kind of thing.

18 Just briefly, your Honor, let me review my argument
19 here and try and very succinctly identify anything that I
20 haven't touched on yet.

21 (Pause at 10:59 a.m.)

22 MR. HINNEN: I'd just -- I guess, just two points in
23 closing, your Honor.

24 The Government puts forth a number of arguments in its
25 -- I think -- thirty-three-paged opposition brief, none of those

1 arguments speaks directly to the Morrison test or alters its
2 application to this case.

3 None of them changes the fact that much of the
4 essential conduct, the Government seeks to compel with the
5 warrant takes place outside the United States. None of them
6 alters the conclusion that enforcing the warrants as to such
7 communications -- communications stored outside the United
8 States -- would be an impermissible-extraterritorial application
9 of the warrant provision and, therefore, the warrants must be
10 quashed.

11 This is not to say, that applying this 1986 statute to
12 a network, that didn't exist and wasn't even conceived of at the
13 time Congress wrote the statute, doesn't have some unusual and
14 even in some cases, your Honor, unfortunate impacts.

15 Modernizing that statute, though, involves weighing
16 the interests of a number of different stakeholders, not just
17 the Government and providers, but users and foreign governments
18 and privacy organizations and that kind of thing.

19 And it involves a number of very, very complex policy
20 issues as well, law-enforcement capabilities, user privacy,
21 international trade with respect to digital goods, international
22 cooperation with respect to -- to law-enforcement
23 investigations, international sovereignty with respect to data.
24 Congress hasn't considered any of those issues, that would be
25 impacted --

1 THE COURT: But Congress -- they have had
2 opportunities and have had looked at a couple of other things
3 and have tackled other laws.

4 I think the -- the Act -- did they have a reason to
5 know or find out, that this is not a workable -- it's been
6 working for so long, you've been producing under the same
7 statute for so long.

8 And suddenly, as of this summer, you begin to --
9 Congress might not even know there was a problem --

10 MR. HINNEN: So --

11 THE COURT: -- that might not be even that question,
12 but --

13 MR. HINNEN: Well, I think a couple of things.

14 First, Google and many other providers were engaging
15 with various parts of the Government to try and modernize and
16 reform the Stored Communications Act, before the Microsoft
17 decision ever came down. I am not contesting for a second, the
18 -- your Honor's proposition that Google did comply with -- with
19 warrants in a different way, before the Second Circuit announced
20 that rule.

21 And second, the flip side of that coin, I think,
22 applies with equal force, your Honor, any time -- and if
23 Congress already meant for warrants to apply to data outside the
24 United States, at any time in the nearly ten months now, since
25 the Second Circuit handed down this decision, while it's been

1 very evident that the Government is having conflicts with
2 providers in different jurisdictions -- different providers in
3 different jurisdictions around the country -- at any time,
4 Congress could have passed a short statute that said, hey,
5 sorry, we weren't clear, we really intended for this to apply to
6 data stored outside the United States.

7 And they haven't done that, there is nothing
8 indicating in 1986 when Congress passed this statute, that they
9 considered that, there is nothing in any subsequent statute,
10 that indicates that Congress considered data stored outside the
11 United States.

12 And I -- I think, we've effectively in the briefing,
13 spoken to why relying on the ratification of a treaty by one
14 house of Congress, twenty years after a statute is passed, is --
15 is not a good basis for --

16 (Sneezing at 11:03 a.m.)

17 MR. HINNEN: -- a statutory interpretation for what
18 Congress meant in 1986.

19 So, at the end of the day, your Honor, unfortunately,
20 this is a problem that Congress has to solve. The Morrison
21 court was very clear, that it's not the province of the Court to
22 speculate as to what Congress would have wanted to be done, if
23 Congress had foreseen a problem.

24 The province of the Court is to apply the statute as
25 Congress passed it in 1986 and as Congress intended it to be

1 applied and that is limited to -- as the Government concedes in
2 Part 1 of the Morrison test -- it's limited to conduct inside
3 the United States, because the warrants in this case require
4 relevant conduct outside the United States, they must be quashed
5 to the extent that they do.

6 THE COURT: Okay.

7 MR. HINNEN: Thank you, your Honor.

8 THE COURT: You're welcome.

9 (Pause at 11:04 a.m.)

10 MR. PAK: Thank you, your Honor.

11 I have an argument prepared, but I think it may be
12 more helpful unless your Honor disagrees --

13 THE COURT: But I -- I had a couple of questions --

14 MR. PAK: Yes.

15 THE COURT: -- to get you started and maybe, you will
16 have an opportunity to go back to your argument, but when we are
17 on the warrant, you argued that the warrant required by 2703 is
18 not a traditional interim warrant but a -- a personal warrant
19 akin to a subpoena.

20 If that's the case, why does the statute require the
21 Government to obtain a warrant issued using the procedures
22 described in the Federal Rules of Criminal Procedure,
23 particularly, 841? And which procedures does the statute
24 incorporate and which procedures does the statute not
25 incorporate?

1 MR. PAK: Sure.

2 So, specifically, the text of 2703, all the warrant --
3 all the portions of it -- that relate to obtaining a warrant,
4 specifically, only refer to procedures as opposed to saying, you
5 have to get what is a Rule 41 search warrant.

6 Furthermore, every time in that section, Congress used
7 the term, warrant and Federal Rules of Procedures, it's followed
8 by -- by a court of competent jurisdiction. The definition of a
9 court of competent jurisdiction is in 18 USC, 2711. And that
10 definition, specifically, trumps a lot of the procedures -- not
11 all of the procedures -- that can be found in Rule 41.

12 For example, Rule 41(b) has what are the traditional,
13 geographical limitations of a -- of a Magistrate Court issuing a
14 particular search warrant. And if you're searching a house, it
15 needs to be in the district, if you're searching a car, it needs
16 to be in the district.

17 2711, the definition of a court of competent
18 jurisdiction, which is only used in tandem with reference to --
19 to the procedures of obtaining a warrant, specifically says that
20 a court is not bound, essentially, by geographical restrictions,
21 but a court will have jurisdiction over a particular -- where
22 the ability to give a particular warrant, if it has jurisdiction
23 over the offense being investigated.

24 And that certainly, that's Congress getting rid of the
25 traditional geographic limitations that are found, for example,

1 in Rule 41(b).

2 There are other changes, there are other ways in which
3 the Stored Communication Act supplants, the procedures that it
4 -- that it -- that are found in the Federal Rules of Civil
5 Procedure or sorry -- of Criminal Procedure.

6 For example, again, under that same definition of a
7 court of competent jurisdiction, your Honor could issue a search
8 warrant, whereas under Rule 41, typically, only a magistrate
9 could. Any court, in fact, within a district that has
10 jurisdiction over the -- over the offense being investigated --
11 can issue such search warrants.

12 So, while the SCA, specifically, calls forward some of
13 the procedures that are outlined in the rules, it supplants many
14 of them.

15 So, the type of process that's created is a little bit
16 different, for example, under a traditional search warrant, what
17 -- what goes on, is a court authorizes law enforcement to take a
18 particular action within a particular place, within -- within
19 the reach of the court. You can do X, Y and Z in furtherance of
20 your litigation, it doesn't involve a third party.

21 And the SCA does, the SCA has a specific authorization
22 to courts to say, you can compel a third party to do X, Y and Z,
23 to produce information in response to a warrant, to produce
24 information in response to a court order, to produce information
25 in response to a subpoena, that's fundamentally different. And

1 in that way, grants courts with *in personam* power over the
2 provider as opposed to any kind of geographical limitation, that
3 you would find in a Rule 41 search warrant -- in a traditional
4 Rule 41 search warrant.

5 THE COURT: Okay.

6 A question, in your view, is the physical location
7 where the disclosure to the Government occurred -- occurs --
8 well, let me just -- let's just -- why don't you respond to the
9 argument, he -- we are working with the Morrison test --

10 MR. PAK: Yes.

11 THE COURT: -- right and the Nabisco test.

12 And you heard the argument, that Mr. Hinnen has made
13 with regards to that test and the interpretation of what it
14 means in terms of the -- the conduct that is relevant to the
15 focus of the statute.

16 So, could you respond to that argument?

17 MR. PAK: Yeah, absolutely.

18 THE COURT: Because the language is, you know, when I
19 read it, I -- the language is not clear to me, but go ahead.

20 MR. PAK: So, I think -- let -- let me backtrack from
21 the end of what Mr. Hinnen was saying, because there -- there
22 was a change, I believe, in -- in certain of the analyses that
23 he was providing with respect to Morrison.

24 So, at first, we're dealing with the question, what is
25 the conduct -- the statutory focus under a Morrison test, right?

1 THE COURT: Right.

2 MR. PAK: What is that conduct and --

3 THE COURT: But you agree that he seems to be -- to be
4 saying, it's as balancing, because the -- the privacy is
5 balanced with the needs of -- of the Government to investigate
6 cases and gather information.

7 MR. PAK: Yes, your Honor.

8 So, at -- at some point, he did say that, I -- I
9 think, the Government's position is twofold with respect to the
10 focus.

11 So, first, the focus by the text of the statute is two
12 things, there are two pieces of conduct, if you were to identify
13 them, that are being regulated when you look at 2703 in any of
14 its directives regarding search warrants.

15 One, it's compelled disclosure, that disclosure occurs
16 in the U.S.

17 Two, it's the requirement that the Government has to
18 get a search warrant, that also occurs in the United States.

19 So, under Morrison, our view is that we're sort of
20 done at that point. The relevant conduct occurs -- all of it --
21 occurs domestically.

22 Now, Mr. Hinnen said, well, conduct relevant to the
23 focus is also appropriate to look at. For example, Google has
24 to go out and reach out in to some of its foreign service in
25 order to get the data.

1 That's not the test, first of all, if -- if that were
2 the -- if that were the test, the Morrison case would be
3 different, the holding in Morrison would be different.

4 So, think for example, of the rule set forth by the
5 Supreme Court under Morrison, which says:

6 If you're going to proceed -- rather, the Securities
7 Exchange Act, the securities fraud provisions of those Acts
8 apply only to certain type of transactions, U.S. transactions or
9 transactions of securities listed on the National Exchange.

10 THE COURT: Right.

11 MR. PAK: Under the rule, you could actually have
12 someone pursue a securities fraud claim, where the fraud
13 occurred overseas. You could have someone overseas pursue a
14 claim against somebody, even though they were defrauded in
15 Australia or somewhere else, as long as they met that one
16 requirement, that the exchange occurred, either, in the U.S. or
17 in a security that was listed on an exchange.

18 And in that way, what the Supreme Court -- the rule
19 that comes out of Morrison -- is basically, look, you have to
20 only look at what is identified -- what is the focus -- as
21 identified in the text of the statute. And it doesn't matter
22 that there's other conduct that may be relevant to that focus,
23 that occurs overseas and --

24 THE COURT: So, I want to interrupt you there. So, I
25 think, you heard what I asked, what are the steps that took

1 place -- according to him -- in the process, once the warrant is
2 issued -- properly issued?

3 And is the searching of the data centers, the
4 isolating of the data, the compiling of the data, the returning
5 of the data, that that all happened outside -- overseas -- ah,
6 and that conduct -- because that conduct happened overseas, then
7 the test is not met?

8 I think that's what I understood -- if I understood it
9 incorrectly, you'll correct me later, but --

10 MR. PAK: I think -- I think -- I think, Google's
11 position -- I -- and so, I don't think Google denies that a
12 portion -- and very important portion -- of what they do in
13 responding to a search warrant occurs here in the U.S. by
14 personnel in the U.S.

15 I think Mr. Hinnen's point was that there's -- the
16 data, itself, sits overseas --

17 THE COURT: Right.

18 MR. PAK: -- and because the way that their code works,
19 it -- it necessarily queries data in a server somewhere else,
20 that there's a lot of action or activity that occurs overseas.

21 Keep in mind --

22 THE COURT: But you're saying that -- that doesn't
23 really matter?

24 MR. PAK: It doesn't matter.

25 THE COURT: -- for purposes me applying the test and

1 determining that this is a domestic application of the Stored
2 Communications Act, because the only two things that matter is
3 the warrant was issued and the warrant compels disclosure and
4 the disclosure happened here?

5 MR. PAK: Yes.

6 The other thing that would matter, your Honor is if,
7 for example, we were dealing with a Chinese e-mail provider or a
8 Canadian e-mail provider, that did business in those respective
9 countries and we tried -- the Government tried -- to use the SCA
10 to compel them to produce the information, that would,
11 obviously, be an extraterritorial application. We're obviously
12 not doing that here, we're dealing with Google, which is a U.S.
13 provider headquartered -- you know -- in the United States.

14 But the way to look at it, analytically, your Honor,
15 is if what Mr. Hinnen was saying, was true, then the SCA would
16 govern not only a requirement that Google produced information
17 when served with the proper process, it would talk about, what
18 Google needs to do, how it needs to run its searches.

19 And if that was regulated by the statute, then I think
20 we might have a problem where -- where we could say, well,
21 maybe, the focus is -- maybe, Congress, you know, decided to
22 legislate around the methods used by a particular company to
23 retrieve data. But that's not at all what Section 2703 says.

24 Section 2703, unlike, other sections of the Stored
25 Communications Act, unlike Section 2701 and 2702, it doesn't

1 refer to access, it doesn't talk about where data is accessed,
2 right, it only refers to disclosure. And I believe, Judge
3 Kabras (ph) in the -- in the dissent on the hearing, makes a
4 very compelling analysis as to why that furthers the position of
5 the Government that when you're looking at 2703, you're talking
6 about the disclosure, it couldn't really be any clearer from the
7 statutory text in 2702 alone. But even if you look at other
8 sections, in order to interpret the language there.

9 So, I think in terms of Morrison --

10 THE COURT: So --

11 MR. PAK: Yes.

12 THE COURT: -- so, this -- you'd kind of agree with --
13 I don't have to worry about search and seizure in the context of
14 the fact that Google is being compelled to retrieve and copy the
15 data responsive to the Government's warrant at the Government's
16 behest, right?

17 MR. PAK: No, no, I -- I think -- I mean, I agree -- I
18 mean, I agree with you, your Honor.

19 THE COURT: Okay.

20 MR. PAK: Yeah.

21 So, it's not a question -- this is not Google acting
22 as an agent for the Government, this is not Google, you know,
23 knocking down doors or this is not Google searching a Microsoft
24 user's account in Dublin, Ireland, right, in which case they
25 would be invading somebody else's possessory interests or

1 interfering with the possessory interests. This is Google
2 accessing the data that it can access at all times for whatever
3 reason it seems -- it seems appropriate.

4 And if that was an invasion of privacy, then,
5 certainly, they'd be guilty of doing that all the time -- any
6 time they moved their subscribers' information around. But
7 that's not -- that's not the issue, because everyone knows when
8 you create an account with Google, you provide the information,
9 they have custody and control of that.

10 And the SCA says, since you are the focal point, we're
11 focused on you, if the Government, you know, meets its certain
12 requirements as we set forth here, then you have to disclose,
13 that is the focus of the statute. And again, that occurs here
14 in the United States.

15 Also, just on the issue of privacy and the balance
16 between privacy and law enforcement needs.

17 One thing -- one thing, that I think, Morrison makes
18 clear as well as RJR Nabisco, but the facts of Morrison make
19 incredibly clear, is that whatever might have motivated Congress
20 to create legislation, it doesn't matter for -- for an
21 extraterritorial -- an extraterritoriality analysis. What
22 matters is the language that they ultimately enacted and to use,
23 maybe, an absurd example, your Honor, if Congress were to enact
24 a statute for purposes of saving the environment, they enacted a
25 statute that regulated the cutting down of trees. The statutory

1 focus under Morrison would be cutting down trees, not saving the
2 environment.

3 The analog here is that, even if Congress wanted to
4 impose certain privacy protections on -- on third-party
5 information, that is analogous to saving the environment in my
6 example. But the method that they used in the statute, the
7 analog to cutting down trees is regulating disclosure.

8 And Morrison treats the analysis this way and you can
9 tell from the facts of the case, because in the -- in the
10 opinion, the court declined to look at whether, you know --
11 whether the fraud occurred in the U.S., whether U.S. victims
12 were harmed, both arguably, what animated Congress to create the
13 legislation in the first place.

14 But it said, no, no, we have to look at specifically,
15 the method of operation of the statute by the text, which is the
16 two types of transactions that I described earlier. And in the
17 same way, that is an analogous to the compelled disclosure.

18 So, everything that Google has said, everything that
19 Amaki (ph), has said with respect to privacy and the fact that
20 that might have been an animating force behind Congress in
21 creating the legislation, it is completely irrelevant under the
22 Morrison test, your Honor.

23 THE COURT: Okay.

24 So, just to -- just to be clear, from your perspective
25 in terms of the analysis -- because some courts go with -- with

1 the language of search and seizure --

2 MR. PAK: May --

3 THE COURT: -- this is not -- this is just disclosure
4 -- compelled disclosure --

5 MR. PAK: -- this is just compelled disclose --

6 THE COURT: -- based on a warrant --

7 MR. PAK: Right, right.

8 THE COURT: -- not a search and seizure and whether
9 the search occurs overseas or in -- in the United States?

10 MR. PAK: Right, right, I think -- I think, that's
11 right.

12 And I think, the only -- the only -- the only point in
13 time when -- when it makes sense to look at where a search and
14 seizure might occur would be if -- and this was Judge Rueter's
15 approach was that -- which was to say, Judge Rueter didn't
16 engage on whether the focus was disclosure or privacy, he
17 assumed, arguendo, that even if it were privacy as Google is
18 arguing or as the Microsoft court had found, that you still --
19 Google would still need to compel the production.

20 And if you'd go down that chain of the analysis, if
21 you were to say that, okay, I don't -- I don't think that
22 disclosure was the focus, which it clearly isn't in the text --
23 but -- but let's -- let's sort of take Microsoft head on and
24 say, even if we were to have assumed it was privacy, then the
25 question becomes, where does that invasion occur? Then, it

1 would be relevant to think about where the invasion occurs.

2 I agree with Google that it's not, necessarily, a
3 matter of Fourth-Amendment doctrine. I think Judge Rueter
4 looked at the Fourth-Amendment doctrine, because it's helpful to
5 understanding where the invasion occurs. But you can think
6 about it from the terms of, listen, if Congress was trying to
7 protect privacy, then what would be the type of invasion of
8 privacy that Congress was worried about?

9 And that invasion isn't, arguably, the -- the
10 repatriation of data that Google already has control over, the
11 invasion of privacy is somebody in law enforcement looking
12 through all your e-mails, looking through your spam, looking
13 through your personal, you know, communications with folks and
14 determining whether that's evidence of a fraud in this case or
15 whatever type of case you may be dealing -- dealing with,
16 determining whether that's something that the Government can
17 then seize and use in a criminal investigation, that's the
18 invasion.

19 THE COURT: And that happens long after there is
20 disclosure?

21 MR. PAK: Long after there is disclosure.

22 THE COURT: All right, okay.

23 MR. PAK: Your Honor, and -- and I would even say,
24 even going a step back, if someone were to take a more -- a
25 slightly different approach -- the invasion would occur when

1 it's given to the Government and it's about to do that search.
2 But all of that occurs domestically.

3 THE COURT: All right.

4 The -- I have two questions -- I don't know if you'd
5 have anything else to add on this argument, if you do please
6 make it now, because the other questions are going to take you
7 off a little --

8 MR. PAK: Okay.

9 THE COURT: -- a little bit of --

10 MR. PAK: No, that's fine, your Honor.

11 THE COURT: Okay.

12 Do you want me to ask the questions?

13 MR. PAK: Yes, please, sorry.

14 THE COURT: All right, yes.

15 So, in 2001, I think you noted, in 2001, that Congress
16 explicitly expanded the jurisdiction of the courts to issue
17 warrants for information located outside the district and I
18 think you mentioned earlier, a little bit about that.

19 But at that point in time, you will agree -- or do you
20 know -- whether Congress considered the extraterritorial litany
21 of issues at that time?

22 MR. PAK: So, going back through the legislative
23 history, I -- I can't say, that Congress had, specifically,
24 engaged, debated on or discussed the question of whether the
25 data was overseas. I think, the examples that we've seen in the

1 legislative history, typically, involved different districts as
2 opposed to a district and data overseas.

3 I will say that the -- the language, though, is clear
4 and the language doesn't, specifically, limit -- limit itself to
5 the United States.

6 Of course, that's -- you know -- we're not sort of
7 hanging our hat on that particular language, it's really just to
8 show that, first of all, Congress has revisited the statute.

9 Secondly, it has taken the statute away from the *In*
10 *Rem* type of territorial requirements that are associated with
11 traditional search warrants under Rule 41.

12 And also, you know, Google's counsel continuously
13 refers to the SCA as the sort of ancient legislation. And your
14 Honor, it was -- I mean, it was enacted in 1986 --

15 THE COURT: In '86, yeah.

16 MR. PAK: -- '86, it's a little --

17 THE COURT: But it's been amended a few times, right?

18 MR. PAK: It's been amended in 2001 and '09.

19 THE COURT: Now, regarding the amendment, the
20 Cybercrime Convention, what is the significance of that?

21 MR. PAK: So, the significance is two fold.

22 So, one is that, you know, there is this question
23 about comity and -- and whether, you know, we're going to start
24 a war with another country, because we can authorize what the
25 SCA clearly authorizes.

1 So, first of all, fifty-two countries -- it was forty-
2 nine at the briefing stage -- but I believe there are fifty-two
3 signatories -- have signed a treaty that, basically says, each
4 country should have domestic legislation -- and it refers to it
5 as domestic legislation -- that does what the Government is
6 arguing, that the SCA already does.

7 Now, Congress when it was time to enact this -- to
8 ratify this and this would be the Senate -- in 2006, ratified
9 it, looked at Article 18(1)(a) and had to make the determination
10 as to whether it needed to create legislation to meet the
11 requirements of the treaty. And it said, no, it didn't, the
12 current law takes care of that.

13 And that shows Congress's view as of 2006, which is,
14 you know -- you know, I -- Google's position is that -- you know
15 -- Congress enacted this in 1986, they didn't think about these
16 things. Well, they did and the only -- and they thought about
17 it in their formal capacity as Congress.

18 Now, we cite a line of cases that granted, does not
19 specifically, involve treaty ratifications, but it involves
20 amendments.

21 And so, in 2006, Congress -- you know, the Senate --
22 decided an amendment wasn't necessary. In 2009, Congress as a
23 whole revisits the SCA and also agrees that -- well, it also
24 doesn't amended, because it already does what the Budapest
25 Convention says, it needs to do. And that is a very good

1 indicator as to what Congress's view of the statute is.

2 Now, we've cited a number of Supreme Court cases that
3 say, the courts can take this into consideration. Google in its
4 reply cites a bunch of cases, that -- that predate all of the
5 cases that we've cited, that predate the first of the line of
6 the cases that we've cited, the Red Lion Broadcasting case --
7 that don't really apply.

8 And also are factually different, there are situations
9 where a member of Congress says, oh, I think the statute means
10 this or that. And clearly, that's not the type of
11 interpretation that we're arguing for here.

12 THE COURT: Very well.

13 At that time, when the convention was held, the
14 providers were complying, right, they were not raising up a -- a
15 stink as they're doing now and saying, you know, you can't get
16 the information, because it's -- it's outside the territory of
17 the United States?

18 MR. PAK: The -- the stink has been raised for the
19 first time, your Honor as -- after the July decision of the
20 Second Circuit, up until now, this wasn't an issue.

21 Up until now, Google already had whatever code it
22 needed to have -- to pull all the data in and respond to search
23 warrants, right, this is an issue that's become live, because
24 Microsoft pushed it and got a decision at the Second Circuit
25 level.

1 And now, all of the providers -- as a result are --
2 are, essentially, unilaterally, applying the Second Circuit
3 decision in every other circuit.

4 THE COURT: All right. Very well.

5 That has it been applied -- I know that Judge Rueter
6 made a ruling on the warrant -- the two warrants in question
7 here and -- and disagreed with -- with their position.

8 And I think, there's another magistrate judge --

9 MR. PAK: So --

10 THE COURT: -- and he submitted supplemental
11 authority, but has any other district court judge ruled on this
12 or the Third Circuit Court?

13 MR. PAK: Your Honor, you would be the first district
14 court judge to be dealing, specifically, with this issue.

15 The two other decisions out there, other than Judge
16 Rueter's decisions are the Eastern District of Wisconsin
17 decision. As well as the Middle District of Florida decisions,
18 both at the magistrate level. Both have agreed with the
19 Government and those -- that's the sum total of litigations --

20 THE COURT: And it's not under appeal yet?

21 MR. PAK: -- that a public -- no, no, no.

22 THE COURT: Oh, okay.

23 What -- what is the standard, is this a *de novo* review
24 of what the judge -- Judge Rueter did?

25 MR. PAK: I think, the standard would be, either,

1 clear error or -- or a mistake of law, so essentially, *de novo*,
2 that's -- in light -- in light of where we are.

3 And this is not a fact-specific scenario, it's just a
4 question of whether Judge Rueter was -- was incorrect in his
5 analysis -- in his legal analysis, so.

6 THE COURT: Okay.

7 Anything else, that I -- that you wanted to argue to
8 me, that --

9 MR. PAK: Yeah, yeah.

10 THE COURT: -- that --

11 MR. PAK: So, there's as few points that I wanted to
12 respond to, that were raised.

13 So, Google in its -- in its argument here as well as
14 in its briefing, talked about Congress's use of the term,
15 warrant and how that has significance.

16 THE COURT: Right.

17 MR. PAK: So, keep in mind, what that essentially --
18 what the argument, essentially means.

19 So, the SCA provides for warrants, court orders and
20 subpoenas, all of that required --

21 THE COURT: Right.

22 MR. PAK: -- them to produce information.

23 The argument, essentially is, because it hinges on the
24 term, warrant, that Congress said, oh, well, there's going to be
25 a domestic limitation for this kind of data, but there's not

1 going to be one for -- for when we use the word, subpoena or
2 when we use the word, court order, which makes no sense, that we
3 would be able to get data, regardless of where it's sat from
4 Google, if we got it by a court order or a subpoena, but not
5 when we'd meet the gold standard of probable cause to get a
6 warrant, that's number one.

7 Number two, your Honor, is that the statute, itself,
8 actually, allows the Government to get contents by a subpoena or
9 a court order.

10 Now, there -- there's a Sixth Circuit case out there,
11 that says, if we did, that could possibly be a Fourth-Amendment
12 issue. But that's a separate issue, that would be a Fourth-
13 Amendment issue for suppression by a criminal defendant.

14 Congress when it enacted the statute, thought that it
15 would be okay for the Government to proceed by subpoena or court
16 order, instead of a warrant to get the same type of information
17 that we're dealing here -- with here.

18 Now, what does that mean? Is -- is there any
19 reasonable explanation as to why Congress would say, okay, well,
20 if you're proceeding under 18 USC, 2703 --

21 THE COURT: With or without notice?

22 MR. PAK: With notice, but we would be able to get --
23 seek delayed notice -- so --

24 THE COURT: Okay.

25 MR. PAK: -- sixty/ninety.

1 THE COURT: Right, right -- to seek --

2 MR. PAK: Yes.

3 But would there be a reason for Congress to say that,
4 you know, the Government can obtain this information by a
5 warrant, but only if it's domestic. But I guess, the Government
6 could also obtain the same information by a subpoena or a court
7 order, regardless of where it sits. That doesn't make sense,
8 because that's not what the term, warrant implies, it doesn't
9 apply it to any common person.

10 In fact, U.S. v. Boc, one of the cases they cite
11 refers to the probable-cause standard, as the warrant standard,
12 because that's obviously, what we think about when we talk about
13 warrants.

14 And this notion that it -- that Congress used that
15 term to protect privacy in a territorial way, it just doesn't --
16 it just doesn't really pan out under the law or under logic.

17 The -- Mr. Hinnen referenced blocking statutes, you
18 asked Google --

19 THE COURT: Right.

20 MR. PAK: -- right.

21 THE COURT: But --

22 MR. PAK: So, ah --

23 THE COURT: -- I wanted to ask, because I think they
24 made a point which I didn't understand as to what is the
25 conflict with the foreign law or comity?

1 MR. PAK: Right, right.

2 So, there are -- the sad -- the cases that he's
3 talking about, I believe, one or two of them are cited in our --
4 in our bit footnote in the *in personam* argument, your Honor.

5 But there are situations -- and it doesn't involve e-
6 mails and it doesn't involve the situation, like, what we're
7 dealing with here -- where defendants or parties or witnesses
8 had been compelled to disclose information and then, they cite
9 blocking statutes, like, there is Swedish law that says, I
10 cannot provide this information and it's -- it's in Sweden.

11 Even in those cases, your Honor, courts are entitled
12 to compel the production and it's also the -- the burden of the
13 party citing a particular blocking statute to bring it up and
14 establish that that is the law and that they've done everything
15 in their power to get around that law.

16 Now, we know from the convention that that's really
17 not an issue when we're dealing with Council of Europe countries
18 and countries that have signed on to that.

19 I can also tell you that Google has registered itself
20 under -- under the EU privacy shield, which actually allows them
21 to comply with information from lawful process here.

22 And again, as your Honor as already noted from the
23 briefs, there is nothing that -- that Google cites to,
24 specifically saying, that there is a violation of this law.

25 And let's look at this practically, your Honor.

1 Google doesn't know where the data is. I mean, they know if
2 it's in the U.S., right. But they don't know if it's in Dublin
3 or in New Zealand or wherever it may be and it moves around
4 quickly.

5 So, what kind of statute could Google cite to, when
6 their data moves around day to day and they don't even know, in
7 which country it -- it is.

8 THE COURT: Right.

9 MR. PAK: So, I mean, as a practical matter, it just
10 doesn't really make sense and it's -- you know, it's nice facial
11 argument to make, but as your Honor has noted, there's not
12 really a -- a concern about comity here, you know, that -- in
13 the way that's addressed in the briefing.

14 THE COURT: Right.

15 If I accept their position, how would you get the
16 information?

17 MR. PAK: Ah, I think, we wouldn't, your Honor.

18 (Laughter at 11:29 a.m.)

19 THE COURT: You wouldn't, right.

20 MR. PAK: I mean, that's -- I mean -- and obviously,
21 that's the issue, not only because of all of the issues that
22 were identified in your questioning of Mr. Hinnen at the
23 beginning of the argument, but also because the data moves
24 around so quickly, which is also part of the stipulations.

25 But as a practical matter, by the time we get -- seek

1 -- legal process and by the time we served it, even if it's on
2 Server A, it -- it can be on a different server, completely, in
3 a different country.

4 THE COURT: Right.

5 You argue -- the argument that you've just made a few
6 minutes ago about, you know, the -- the -- we could get the
7 information by a court order or by a subpoena and the warrant
8 requirement, which would enforce the golden standards.

9 But my question to you is, under either scenario,
10 warrant, subpoena or court order, would the Morrison analysis
11 apply?

12 MR. PAK: So, if you were to take -- let's -- let's
13 say, the Second Circuit decision, the panel decision was the law
14 of the land, if it was a Supreme Court decision and -- which is,
15 essentially, the same argument Google is making.

16 So, under Morrison -- I'm sorry -- under -- under the
17 Second Circuit's analysis, the extraterritoriality problem only
18 exists, because Congress used the term, warrant. Congress also
19 used the term, subpoena in the SCA and so that problem wouldn't
20 exist in there -- it would exist with respect to subpoenas.

21 And, in fact, the Second --

22 THE COURT: So, it doesn't apply, the analysis?

23 MR. PAK: Yeah, it doesn't, even if you were going to
24 apply that, the -- the extraterritorial issue wouldn't -- the
25 extraterritoriality issue, it would not come up, if you were to

1 accept Google's argument and Microsoft's argument, it would not
2 come up outside the context of the warrant requirement in -- in
3 the SCA.

4 THE COURT: Okay.

5 So, it would not apply to the warrant or -- the court
6 order -- the analysis would not apply to a subpoena or a court
7 order --

8 MR. PAK: Right.

9 So, we would be able to --

10 THE COURT: -- the -- the Morrison analysis.

11 MR. PAK: -- under the Second Circuit opinion, the
12 Government would be able to get content -- ah --

13 THE COURT: How about the Morrison test, would it
14 apply --

15 MR. PAK: I'm sorry -- sorry.

16 THE COURT: -- would the Morrison test apply to a
17 subpoena or a court order?

18 MR. PAK: So, the Morrison test, ah, if it were to
19 apply, ah, you would not have a -- you would not -- right, so,
20 if we were to apply that test, you would not have an
21 extraterritoriality problem with respect to subpoenas or court
22 orders and I don't -- I'm not sure if that answers your
23 question.

24 THE COURT: Why -- why not?

25 MR. PAK: Well, first of all, because subpoenas -- for

1 the same reason, that we'd argue -- for the same reason that
2 we'd argue with respect to warrants, we're dealing with
3 disclosure and compelled disclosure in the context of subpoenas,
4 in the context warrants and in the contents of court -- in the
5 context of court orders. And that disclosure occurs here in the
6 United States, number one.

7 Number two, the only reason this was raised in first
8 place, as potentially a problem, it was because the Second
9 Circuit's analysis which hinges on the use of term, warrant, so
10 where that term is not used, you wouldn't raise a Morrison
11 problem.

12 THE COURT: All right. Okay. Anything else?

13 MR. PAK: Ah, your Honor, I think, if you don't have
14 any questions for me, we would rely on our briefing outside of
15 what I've --

16 THE COURT: No, I --

17 MR. PAK: -- mentioned so far.

18 THE COURT: -- I think -- I -- all the questions I had
19 for you.

20 I am going to give Counsel a few opportunities for
21 rebuttal and then, we'll conclude, we've been at it for a little
22 while.

23 MR. PAK: Okay. Thank you, your Honor.

24 THE COURT: You're welcome.

25 (Pause at 11:32 a.m.)

1 MR. HINNEN: Your Honor, mindful of the fact that
2 we've been at it for a little while, I'll try --

3 THE COURT: Right.

4 MR. HINNEN: -- to be as brief as possible here --

5 THE COURT: I appreciate that, thank you.

6 MR. HINNEN: -- I -- I would like to respond to a
7 couple of quick things.

8 The Government invokes the definitions in Section 2711
9 and the amendment to that definition, that Congress made after
10 the statute was enacted in 1986.

11 That certainly can be read either way and, in fact, it
12 might most naturally be read as -- as pregnant omission of -- of
13 the mention of a -- a warrant or any other legal process under
14 the SCA applying outside the United States.

15 Congress, specifically, amended the statute to say, it
16 can apply outside the district. Congress, specifically, did not
17 amend the statute to say, it can apply outside the United States
18 or it applies to data stored outside the United States as well.

19 THE COURT: Of course, at that time, we didn't have
20 the decision from the Second Circuit.

21 MR. HINNEN: That's correct.

22 I think also relying on that definition confuses the
23 extraterritorial application of the statute with the
24 jurisdiction of the Court over -- over the individual or -- or
25 the crime under investigation. So, I think, they are apples and

1 oranges -- oranges in that respect as well.

2 The provision of the Stored Communications Act that
3 compels a provider to assist the Government in obtaining
4 documents, it is not substantially different from the Assistance
5 provisions in the Wiretap Act and the Pen Register Trap and
6 Trace Act, all of which were passed as part of the original --
7 and one of which was amended, the Wiretap Act was amended.

8 The Pen Register Trap and Trace and the Stored
9 Communications Act were passed as part of an omnibus piece of
10 legislation called, the Electronic Communications Privacy Act,
11 so Congress viewed these things as a whole. Those assistance
12 provisions are limited to the United States.

13 No one has ever suggested and no one would suggest,
14 that provider could be compelled to implement a wiretap out --
15 on its network infrastructure -- outside the United States or
16 that it could be compelled to implement a Pen Register Trap and
17 Trace on its infrastructure outside the United States,
18 regardless of where the person implementing the wiretap was
19 sitting.

20 I -- the Government's argument that all relevant
21 conduct occurs domestically, is like saying, your Honor, if you
22 ignore all the conduct that occurs overseas, all of it occurs
23 domestically.

24 It's true that if you'd take out the steps in the
25 process that occur overseas, that the -- that the statute

1 requires Google to take, that Google would never take, if it
2 didn't -- hadn't received the warrant compelling it to do so,
3 that everything else occurs inside the United States.

4 But that's not what the -- that's not what the -- what
5 the statute requires the Court to look at.

6 The Government said, if that conduct was -- was
7 regulated by the statute, that would be a different story, the
8 conduct is regulated by the statute.

9 If Google weren't required to take that conduct by the
10 statute, we wouldn't be here. We would have complied with the
11 warrant completely, we've done everything we can inside the
12 United States to comply with the statute.

13 If the conduct that the Government is trying to compel
14 Google to undertake with the warrant, isn't regulate by the
15 statute, then that resolves the case and we -- and we can all go
16 home.

17 The Morrison test doesn't say, what word is used in
18 the statute, it says, what conduct is relevant to the focus of
19 the statute, it's a good deal broader in inquiry than the
20 Government would lead the Court to believe.

21 It really expressly -- it doesn't say, look just at
22 the focus and where the focus occurs, it says, look at where the
23 conduct relevant to the focus of the statute occurs and --

24 THE COURT: Which is the -- which they argue is the
25 disclosure and the fact, that the warrant has been issued --

1 MR. HINNEN: That's --

2 THE COURT: -- right?

3 MR. HINNEN: -- that's correct, that's what they are
4 -- that's what are --

5 THE COURT: That's all they need?

6 MR. HINNEN: It's not all they --

7 THE COURT: That's the argument, right?

8 The rest is your problem of how you produce it?

9 MR. HINNEN: It's -- it's not all they need, your
10 Honor, if we don't have to take any steps outside of the United
11 States, then we're done. We've taken all the steps inside --

12 THE COURT: No, you have to step -- you have to take
13 steps to comply, whatever those steps may be to -- to -- that
14 are responsive to the -- to the warrant.

15 MR. HINNEN: I agree and those steps are relevant
16 to --

17 THE COURT: Okay.

18 MR. PAK: -- relevant to the focus of the statute,
19 that's correct.

20 THE COURT: Right.

21 MR. HINNEN: Ah, the Government argues that whatever
22 might have motivated Congress doesn't matter, that's contrary,
23 your Honor, to centuries of statutory interpretation. It is, in
24 fact, the intent of Congress that is the lynchpin and the
25 touchstone of statutory interpretation. So, I am not sure what

1 the Government means when it says that.

2 The fact -- the Government also emphasized, you know,
3 it was only thirty-one years ago, that the statute was passed,
4 there have been some minor amendments since then.

5 The Internet didn't even exist thirty-one years ago
6 when the statute was passed, Google didn't exist, many of the
7 companies that are impacted by this, didn't exist. In the
8 lifetime of Internet, that thirty-one years is more than the
9 whole lifetime of the Internet.

10 So, it's -- as we say in our briefing -- in the
11 lifetime of the Internet, that thirty-one years is an epic.

12 I think, our briefing addressing the Sealy Cybercrime
13 Convention issue, effectively. There is no -- there is no case
14 that says, that the Senate exercising its advice and consent
15 authority can step in to the shoes of Congress as a whole and
16 express the -- the intent of the entire body, it's a -- it's a
17 completely different function, it even -- it exists in a
18 different Article of the Constitution.

19 I -- I guess, the last thing to clarify, the -- your
20 Honor, is that Google has not and is not interposing a blocking-
21 statute objection to the warrant in this case. That issue came
22 up only as a result of -- of the question of whether there was
23 any potential conflict with -- with foreign law or whether there
24 was any potential comity issue.

25 And the passage of those blocking statutes, very

1 clearly indicates that foreign governments are interested in
2 this issue, that they're interested in how U.S. law can compel,
3 the production of documents stored in their jurisdictions.

4 In the Microsoft case, the government of Ireland
5 participated as an -- and an *amicus*. And it objected to the
6 application of U.S. law to data stored within Ireland.

7 There just is no question as a factual matter, that
8 foreign governments care deeply about this issue and that
9 resolving this issues has ramifications for diplomacy, for
10 comity and for international trade.

11 THE COURT: Okay.

12 MR. HINNEN: Thank you, your Honor.

13 THE COURT: Well, thank you very much for your
14 arguments. I will take it under advisement and I will issue an
15 order in due course. Thank you.

16 MR. PAK: Thank you, your Honor.

17 MR. HINNEN: Thank you, your Honor.

18 ESR OPERATOR: All rise.

19 (Adjourned in this matter at 11:39 a.m.)

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C E R T I F I C A T E

I do hereby certify that the foregoing is a correct transcript of the electronic-sound recording of the proceeding in the above-entitled matter.

Date: April 24, 2017

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